91-1752

(2)

Supreme Court, U.S.
FILED
MAR 23 1992
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

RUSSELL JAMES WOOD, M.D.,
Petitioner,

vs.

MELVIN J. FREEDMAN, M.D., et al.,
Respondents.

SUPPLEMENT TO THE
Petition for a Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

APPENDIX B

Russell James Wood, MD
Pro Se
18 Wiltshire Court
Edwardsville, Il 62025
618-656-3293

Attorney for Petitioner

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF ILLINOIS

Filed Jul 31, 1989
Stuart J. O'Hare
Clerk, U.S. District Court
Southern District of Illinois
Alton Office

No. 89 5080

RUSSELL JAMES WOOD, MD,]
Plaintiff,]
]
-vs-]
]
MELVIN J. FREEDMAN, MD, Et al.,]
Defendants.]

This matter is before the court on the renewed and expanded motion to Dismiss Plaintiff's Second Amended Complaint filed on behalf of Crescent County's Foundation for Medical Care (Crescent Counties), Thomas R. Hyngstrom, Wendell H. Adair, Jr, and Laurence M. Trusdell, based upon the Plaintiff's failure to state a cause of action upon which relief may be granted.

The Plaintiff originally brought this cause of action on April 5, 1988, in the Circuit Court for the Twenty Second Judicial Circuit of Missouri against over 20 defendants based upon their participation in a sanction recommendation by the federal Peer Review Organization (PRO) for the State of Illinois under the federal Medicare program. The action was removed to the United States District Court for the Eastern District of Missouri. On January 6, 1989, this cause was transferred to this court pursuant to 28 U.S.C. §1404(a).

The plaintiff's second amended complaint

consists of 33 pages wherein the plaintiff claims damages in several counts based upon a number of legal theories, i.e., violations of the Sherman and Clayton Acts; violations of the federal RICO statute; negligence; libel/slander; willful and wanton misconduct and/or fraud; tortious interference with contracts; and violations of the state anti-trust laws. All of the plaintiff's alleged damages were sustained as a result of the federal government's decision to exclude the plaintiff from the federal Medicare program pursuant to the recommendation of Crescent Counties, the federal Peer Review Organization for the State of Illinois.

Movant Hyngstrom is the executive director of Crescent Counties and movants Adair and Trusdell are the attorneys for Crescent Counties. Crescent Counties is a federal review organization established pursuant to 42 U.S.C. §1320c-2, to insure that physicians participating in the Medicare program meet the obligation to assure that medical care provided to Medicare beneficiaries will be provided only when medically necessary, and that the medical care will be provided economically and will be of a quality meeting professionally recognized standards of health care. 42 U. S. C. §1320c-5(a). The professional review organization enters into a contract with the Health Care Financing Administration of the Department of Health and Human Services to be responsibile for a particular geographic area. 42 U.S.C. §1320c-2.

The function of the Professional Review Organization is to review some or all of the professional activities in the area to determine whether the health care services being provided are reasonable and medically necessary; are of a quality which meets

professional standards; and are being performed economically. 42 U.S.C. §1320c-3 (a)(1).

As a result of this procedure, Crescent Counties recommended that the plaintiff be excluded from the federal Medicare program for one year as a sanction for failing to meet the statutory obligations to provide the specific type of medical care to Medicare beneficiaries as described in 42 U.S.C. §1320c.

The moving defendants base their motions to dismiss on the grounds that participants in the federal peer review process are entitled to absolute federal officers/actor immunity from all state law claims and absolute judicial prosecutorial immunity from all claims, state or federal. In support of its position, the moving defendants rely on Kwoun v. Southeast Missouri Professional Standards Review Organization, 811 F.2d 401 (8th Cir. 1987), cert. denied, _____U.S._____, 108 S.Ct. 1994, 100 L. Ed. 2d 226 (1988), Rehearing denied, _____ U.S. _____, 109 S.Ct. 200. In Kwoun, the Court held that the regional peer organizations were held to be federal actors for the purpose of any analysis of their activities in relation to the investigation, in that the review process was established and governed by federal law. Kwoun, 811 F.2d at 406-407. As federal officials, the court further held that the participants of the review process were "immune from common law tort claims if their actions were not ". . . manifestly or palpably beyond [their] authority." Bushman, 755 F. 2d at 655, quoting Norton v. McShane, 332 F.2d 855, 859 (5th Cir. 1964), Cert. denied, 380 U.S. 981, 85 S. Ct. 1345, 14 L.Ed.2d 274 (1965)."

With respect to the constitutional

claims, the Kwoun Court recognized that the reasoning for granting absolute immunity to federal officials from common law tort claims, i.e., to protect them "in the execution of their federal statutory duties from criminal or civil actions based on state law," Butz v.Economou, 438 U.S. 478, 489, 98 S.Ct. 2894, 2902, 57 L.Ed.2d 895 (1978) does not apply to claims based on violation of constitutional law. Id. 438 U.S. at 495, 98 S.Ct. at 2905, Kwoun, 811 F.2d at 405. Thus, with respect to constitutional claims, absolute immunity is only granted in "those exceptional situations where it is demonstrated that absolute immunity is required for the conduct of public business." Butz, 438 U.S. at 507, 98 S.Ct. at 2911. Accordingly, absolute immunity is required for the conduct of public business when judicial, prosecutorial and legislative functions are involved. Harlow v. Fitzgerald, 457 U.S. 800, 811, 102 S. Ct. 2727, 2734, 73 L. Ed.2d 396 (1982).

In analyzing the functions of the peer review groups, the Kwoun Court held that the peer review groups are indeed functioning in a prosecutorial role in that the peer review group has the obligation of deciding whether a proceeding should be brought and what sanctions should be sought against a specific target. Kwoun, 811 F.2d at 406, 408-09.

Similarly, under the reasoning of Butz v. Economou, supra, participants in the federal peer review process must be afforded absolute immunity for any claimed violations of federal and state statutes. As the court stated in Butz,

> [w]e also believe that agency officials performing certain functions analogous to those of a prosecutor should be able

> to claim absolute immunity with respect to such acts. The decision to initiate administrative proceedings against an individual or corporation is very much like the prosecutor's decision to initiate or move forward with a criminal prosecution. An agency official, like a prosecutor, may have broad discretion in deciding whether a proceeding should be brought and what sanctions should be sought . . .
>
> The discretion which executive officials exercise with respect to the initiation of administrative proceedings might be distorted if their immunity from damages arising from that decision was less than complete. Cf. Imbler v. Pachtman, 424 U.S. at 426 n. 24, 96 S.Ct. at 993 n.24. While there is not likely to be anyone willing and legally able to seek damages from the officials if they do not (Emphasis in original) authorize the administrative proceeding, Cf, Id, at 437, 96 S. Ct. at 998 (White, J. concurring in judgment), there is a serious danger that the decision to authorize proceedings will provoke a retaliatory response. An individual targeted by an administrative proceeding will react angrily and may seek vengeance in the courts. A corporation will muster all its financial and legal resources in an effort to prevent administrative sanctions.
>
> Butz, 438 U.S. at 515, 98 S.Ct. at 2915. (Emphasis added).

Through exercising the responsibilities of the peer review organization, i.e., in the role of federal actors/officers and the role of a prosecutor, the defendants would be entitled to absolute immunity from any claims brought against them, be it

statutory violations, common law torts or constitutional claims.

In response to this motion to dismiss the plaintiff relies on the Supreme Court decision in Patrick v. Burget, _____ U. S. ____, 108 S. Ct. 1658, 100 L. Ed. 2d 83 (1988), Shahawy v. Harrison, 1989 U.S. App. LEXIS 9212 (11th Cir. 1989) and 42 U.S.C. §11111 through §11152 (Supp. 1987), for the proposition that the defendants herein are not absolutely immune from this action. This reliance, however, is misplaced. The issue before the court in Patrick was whether physicians were immune from federal antitrust liability for their activities on hospital peer review committees based upon the state action doctrine enunciated in Parker v. Brown, 317 U. S. 341, 63 S. Ct. 307, 87 L.Ed. 315 (1943). The issue before the Patrick Court was whether the state sufficiently supervised the private peer review of the hospital which had discharged a physician from its medical staff in order to invoke the state action exemption, which exempts official action by or directed by a state from anti-competitive actions. Patrick, supra. Similarly, in relying on Patrick, the Eleventh Circuit was required to determine whether the state action doctrine applied to a hospital board's termination of a physician's medical staff membership and other privileges. Shahawy, 1989 U.S. App. LEXIS 9212 at 13-16.

Both Patrick and Shahawy address and resolve issues not present in the pending matter. The defendants do not claim state action immunity from the plaintiff's claims nor is there any claim that the state was required to supervise the administration of the peer review process under 42 U. S. C. §1320c. The instant matter addresses federal actors/officers and prosecutorial

functions and the immunity granted to them. Thus, the argument that Patrick and subsequent cases construing Patrick are relevant to this determination are without merit.

Furthermore, although the plaintiff recognizes the grant of immunity for anti-trust claims for certain peer review organizations, as provided in 42 U. S. C. §11111 through §11152, the plaintiff urges that the defendants herein are not entitled to such immunity because certain prerequisite requirement were not satisfied in order to invoke the immunity. See 42 U.S.C. §11112. Again, plaintiff's reliance on these provisions is misplaced. Section 11111 applies to professional review action (as defined in §11151 (9) of Title 42. Professional review action is defined as "an action or recommendation of a professional review body . . ." 42 U. S. C. §11151(9). A professional review body is a "health care entity and the governing body or any committee of a health care entity which conducts professional review activity . . ." 42 U.S.C. §11151(11). A health care entity means a hospital, an entity which provides health care services, (HMO's) and a professional society of physicians or other licensed health care practitioners. 42 U.S.C. §11151(4). Thus, the provisions of 42 U. S. C. §§11111 through 11152 apply only to the health care entities, i. e., hospitals, health maintenance organizations or group medical practices, or professional societies of physicians or other health care practitioners. These provisions of the statutes do not apply to the peer review organizations established under the Medicare review structure, but rather to the types of peer review activities involved in Patrick and Shahawy.1

The actions taken by Crescent Counties and its Executive Director, were taken pursuant to 42 U.S.C. §1320c, and as such, these actions are afforded absolute immunity as enunciated in Kwoun, supra.

With respect to defendants Adair and Trusdell, as attorneys for Crescent Counties and Hyngstrom, no cause of action can exist against them. In that Crescent Counties and Hyngstrom are absolutely immune from any cause of action for their participation in the peer review organization, the plaintiff has no underlying actions taken by Crescent Counties and Hyngstrom upon which to base his action against Adair and Trusdell, for their advice to, and counselling of Crescent Counties and Hyngstrom.

Accordingly, Crescent Counties, Hyngstrom, Adair and Trusdell's renewed and expanded Motion to Dismiss Plaintiff's Second Amended Complaint is hereby granted with prejudice.

IT IS SO ORDERED.
DATED: This 31st day of July, 1989.

WILLIAM L. BEATTY
UNITED STATES DISTRICT JUDGE

1 As the Patrick Court pointed out, "[c]ongress in fact insulated certain medical peer review activities from anti-trust liability in the Health Care Quality Improvement Act of 1986, 42 U.S.C.A. §§11101-11151 (Supp. 1987)." The Patrick Court further recognized that this immunity did not apply in the Patrick case in that the events in Patrick occurred prior to the enactment of the Act, and therefore could not be applied retroactively. Patrick, 108 S.Ct. at 1665, n.8.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF ILLINOIS

Filed Sep 22, 1989
Stuart J. O'Hare
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
ALTON OFFICE
No. 89-5080

RUSSELL JAMES WOOD, MD,
Plaintiff,

-vs-

MELVIN J. FREEDMAN, MD, Et al.,
Defendants.

ORDER

The motion to dismiss Plaintiff's Second Amended Complaint filed by the defendants, Melvin Freedman, Central Illinois Medical Review Organization, et al., is called, heard and sustained.

It is therefore ordered that said motion to dismiss is granted and the defendants Melvin J. Freedman, MD, Central Illinois Medical Review Organization, Norman Taylor, MD, Chester Hill, MD, Edward DuVivier, MD, Harold J. Kolb, MD, Thomas O'Neill, George Taylor, MD, Walter Williams, MD, Marshall T. Hale, MD, Michael Brewer, MD, Michael Pick, MD and J.D. Winterhalter, MD are hereby dismissed from cause with prejudice.

WILLIAM BEATTY
Sep 22, 1989